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Fo Boon Joan & Ors v Lim Kew Seng & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S3)–23–69 OF 1993

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AZMEL J

13 SEPTEMBER 2007

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Civil Procedure — Locus standi — Want of authority — Members of the society commencing action against the trustees and the society's committee — Whether action should have been commenced in the name of the society — Application of rule in Foss v Harbottle

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Trusts and Trustees — Land — Transfer — Land belonging to society exchanged for another land — Society could not raise amount of money for conversion costs and drainage fee — Society entered into agreement with third party for financial assistance — Whether any wrongdoing committed

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The plaintiffs were members of 'Persatuan Kheng Chew' ('the society'). At the material time the defendants were trustees and the society's committee. The crux of the plaintiffs' case against the defendants was that they had unlawfully

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transferred out the land of the society without the consent of the society and/or majority of its members and that in doing so, they had committed breach of trust, breach of fiduciary duties (failure to exercise due care, skill and diligence for the benefit of the members of the society) and defrauded the society. The society wanted to built a temple and applied and was alienated

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with a piece of land known as HS(D) 10427, Lot 3 Mukim dan Bandar Kuala Lumpur ('10427 land'). As it was difficult to carry out works because of the gradient of 10427 land, Tan Sri Lim Goh Tong ('Tan Sri'), the owner of a neighbouring land requested the society to reconsider the building of the temple on the 10427 land as it would affect the security of his house. He

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offered to exchange 2.08 acres of land known as Mukim Grant No 67 Lot 42 Mukim Kuala Lumpur (Lot 42) with the 10427 land. The total area of Lot 42 was 4.8 acres. It was registered in the name of Kien Huat Realty Sdn Bhd ('Kien Huat') of which Tan Sri was a shareholder and director. But the society had to pay the conversion costs and drainage fee. Kien Huat suggested to the

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society that if they wanted the remaining part of Lot 42 they would have to pay an additional amount of RM400,000 in the form of a donation to Yayasan Lim (a charitable foundation set up by Tan Sri) thus making a total payment of RM927,198 for the society to get the whole of Lot 42. As the society could not raise that amount of money, it requested the assistance of

Grand Ocean Development Berhad (a public listed company where most of its shareholders were also members of the society) and the defendants were the directors. Two further agreements namely the supplementary deed dated 8 June 1981 between Kien Huat and the society; and a joint venture agreement dated 26 June 1981 between the society and Grand Ocean were signed to effect the transaction. Subsequently, Lot 42 was subdivided into two separate titles, GM 1518 Lot 97 section 94B Mukim Kuala Lumpur ('1518 land') and GM 1519 Lot 98 section 94B Mukim Kuala Lumpur ('1519 land'). The 1518 land was used to built the temple. The 1519 land was later transferred to Grand Ocean (where the use of land was for construction of condominium) pursuant to the agreements. The disputes between the plaintiffs and the defendants centred mainly on three issues, namely: (a) whether the plaintiffs have the *locus standi* to commence this action against the defendants; (b) whether the 1519 land was the property of the society; and (c) whether the plaintiffs have proven their case against the defendants in law.

Held, dismissing plaintiff's claims with costs:

(1) As regards to the first issue, the court found that the plaintiffs did not have the locus standi to commence this action against the defendants for the benefit and interest of themselves and other members of the society. It was clear from the facts of the case that the wrongdoing was alleged to have been committed against the society or against the majority of its members. Following the rule in *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189, the action in this case must be made/commenced in the name of the society. That had not been done. Neither was it commenced in the name of the majority of the members of the society. There was no evidence that the plaintiffs had the consent of the majority of the members of the society to commence this action on their behalf. This fact had been admitted by the fourth plaintiff when he stated in evidence that he did not have any consent from the society to commence the action (see paras 21–22).

(2) As regard the second issue, based on the evidence, the 1519 land had never become the property of the society. All the time it was the property of Kien Huat. What had actually transpired at the exchange was that the 10427 land was to be exchanged with the 1518 land, which was part of Lot 42. To enable the exchange transaction to proceed the solution was reached that a third party, Grand Ocean Development Bhd would come in to assist by absorbing the conversion cost and drainage fee and purchase the remaining portion of Lot 42 by making the donation to Yayasan Lim in the sum of RM400,000. Only after such involvement of the third party could the exchange of land take

A place. Without the assistance of Grand Ocean Development Bhd the 1519 land could never have been transferred to and owned by the society. In so far as the society was concerned the exchange between the 10427 land and the 1518 land was free of any payments whatsoever (see paras 25 & 28).

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(3) Prior to subdivision, Kien Huat could not transfer the two parts of Lot 42 to two different parties. Lot 42 was originally transferred to the society on the basis of the above understanding and upon it being subdivided, the society transferred the other part of Lot 42 (the 1519 C land) to Grand Ocean Development Bhd who had borne all the payments thereof. This was why the 1519 land was initially registered in the name of the trustees of the society, only as a mechanism to effect the transfer of the land. There was no issue of any alleged wrongdoing by the defendants in transferring the 10427 land. Grand Ocean was in D fact doing the society a big favour in coming up with the financial assistance without which the exchange transaction could not have taken place (see paras 29–30).

(4) As regard to the third issue, the court found that the plaintiffs had failed E to discharge its burden of proof. From the facts of the case, it was clear that the defendants had on two different occasions disclosed the dealings with Tan Sri to the society during its Annual General Meetings in 1985 and 1990. Therefore, no fraud or breach of fiduciary duties had ever been committed by the defendants. The plaintiffs also failed to F prove that the 1519 land was given to the society free of charge (see paras 31–32).

[Bahasa Malaysia summary

G Plaintif-plaintif (plaintif) adalah ahli-ahli Persatuan Kheng Chew ('persatuan tersebut'). Pada masa yang material, defendan-defendan ('defendan') adalah pemegang amanah dan jawatankuasa persatuan tersebut. Intipati kes plaintif terhadap defendan ialah bahawa mereka telah secara menyalahi undang-undang memindahkan keluar hartanah persatuan tersebut tanpa H kebenaran persatuan dan/atau majoriti ahli-ahlinya dan dalam berbuat demikian, mereka telah melakukan pecah amanah, perlanggaran kewajipan fidusiari (kegagalan untuk bertindak dengan penuh ketekunan, kemahiran dan penjagaan untuk kebaikan ahli-ahli persatuan tersebut) dan menipu persatuan tersebut. Persatuan tersebut ingin membina satu kuil dan I memohon dan telah diberimilik sebidang tanah dikenali sebagai HS(D) 10427, Lot 3 Mukim dan Bandar Kuala Lumpur ('tanah 10427'). Oleh kerana ia adalah payah untuk menjalankan kerja-kerja disebabkan gradien tanah 10427 tersebut, Tan Sri Lim Goh Tong (Tan Sri), pemilik tanah sebelah telah meminta persatuan tersebut untuk menimbang sekali lagi

pembinaan kuil tersebut di tanah 10427 tersebut oleh kerana ia akan menjejaskan keselamatan rumahnya. Beliau menawarkan untuk bertukarmilik 2.08 ekar tanah yang dikenali sebagai Mukim Grant No 67 Lot 42 Mukim Kuala Lumpur ('Lot 42') dengan tanah 10427 tersebut. Luas keseluruhan Lot 42 adalah 4.8 ekar. Ia didaftarkan di bawah nama Kien Huat Realty Sdn Bhd ('Kien Huat') di mana Tan Sri adalah pemegang saham dan pengarah. Akan tetapi persatuan tersebut dikehendaki membayar kos penukaran syarat tanah dan yuran perparitan. Kien Huat mencadangkan kepada persatuan tersebut bahawa sekiranya mereka ingin baki Lot 42 yang tertinggal mereka patut membayar amaun lebihan sebanyak RM400,000 sebagai derma kepada Yayasan Lim (sebuah yayasan yang ditubuhkan oleh Tan Sri) dengan itu menjadikan jumlah bayaran sebanyak RM927,198 untuk persatuan tersebut mendapatkan keseluruhan Lot 42. Oleh kerana persatuan tersebut tidak berupaya untuk mendapatkan jumlah tersebut, ia telah meminta pertolongan Grand Ocean Development Berhad (sebuah syarikat awam yang disenaraikan di mana kebanyakan pemegang-pemegang sahamnya adalah juga ahli-ahli persatuan tersebut) dan defendan adalah pengarah-pengarah. Dua perjanjian lanjutan dari itu, iaitu surat ikatan tambahan bertarikh 8 Jun 1981 di antara Kien Huat persatuan tersebut; dan satu perjanjian usaha sama bertarikh 26 Jun 1981 di antara persatuan tersebut dan Grand Ocean ditandatangani untuk memberi kesan transaksi tersebut. Selepas itu, Lot 42 dipecahkan kepada dua hamilik yang berlainan, GM 1518 Lot 97 seksyen 94B Mukim Kuala Lumpur (tanah 1518) dan GM 1519 Lot 98 seksyen 94B Mukim Kuala Lumpur (tanah 1519). Tanah 1518 digunakan untuk membina kuil tersebut. Tanah 1519 kemudiannya dipindahkan kepada Grand Ocean (di mana kegunaan tanah tersebut adalah untuk pembinaan kondominium) mengikut perjanjian-perjanjian tersebut. Pertikaian di antara plaintif dan defendan bertumpu kepada tiga isu-isu utama, iaitu: (a) sama ada plaintif mempunyai locus standi untuk memulakan tindakan ini terhadap defendan; (b) sama ada tanah 1519 adalah hartanah persatuan tersebut; dan (c) sama ada plaintif telah membuktikan kes mereka terhadap defendan mengikut undang-undang.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Berhubungan dengan isu pertama, mahkamah mendapati bahawa plaintif tidak mempunyai locus standi untuk memulakan tindakan ini terhadap defendan demi faedah dan kepentingan mereka sendiri dan juga ahli-ahli persatuan yang lain. Ia adalah jelas daripada fakta-fakta kes bahawa perbuatan salah dikatakan telah berlaku terhadap persatuan tersebut atau terhadap majoriti ahli-ahlinya. Mengikut rukun am *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189, tindakan kes ini mesti dilakukan/dimulakan di atas nama persatuan tersebut. Ini tidak dilakukan. Ia juga tidak dimulakan di atas nama majoriti ahli-ahli

A persatuan tersebut. Tiada bukti bahawa plaintif-plaintif telah mendapatkan kebenaran majoriti ahli-ahlinya untuk memulakan tindakan ini bagi pihak mereka. Fakta ini telah diakui oleh plaintif keempat apabila beliau menyatakan dalam keterangan bahawa beliau tidak mendapatkan sebarang kebenaran daripada persatuan tersebut B untuk memulakan tindakan ini (lihat perenggan 21–22).

(2) Berhubungan dengan isu kedua, berdasarkan keterangan, tanah 1519 tidak pernah dijadikan hakmilik persatuan tersebut. Pada setiap masa ia adalah hakmilik Kien Huat. Apa yang sebenarnya berlaku pada C pertukaran tersebut ialah tanah 10427 ditukarkan dengan tanah 1518, yang merupakan sebahagian Lot 42. Untuk membolehkan transaksi penukaran dijalankan satu penyelesaian dicapai bahawa satu pihak ketiga, Grand Ocean Development Bhd akan membantu untuk menyerap kos penukaran syarat tanah dan yuran perparitan dan D membeli baki Lot 42 dengan mendermakan jumlah RM400,000 kepada Yayasan Lim. Hanya selepas penglibatan ini oleh pihak ketiga penukaran tanah dapat dilakukan. Tanpa bantuan Grand Ocean Development Bhd tanah 1519 tidak akan dapat ditukarmilik dan dimiliki oleh persatuan tersebut. Di mana persatuan adalah berkenan E penukaran di antara tanah 10247 dan tanah 1518 adalah bebas daripada sebarang bayaran (lihat perenggan 25–28).

(3) Sebelum perpecahan, Kien Huat tidak dapat memindahkan 2 bahagian Lot 42 kepada 2 pihak-pihak berlainan. Lot 42 pada asalnya F dipindahkan kepada persatuan tersebut atas dasar kefahaman di atas dan selepas ia dipecahkan, persatuan memindahkan satu lagi bahagian Lot 42 (tanah 1519) kepada Grand Ocean Development Bhd yang telah membuat keseluruhan bayaran tersebut. Ini adalah sebab mengapa tanah 1519 pada mulanya didaftarkan di atas nama pemegang amanah G persatuan tersebut, hanya sebagai mekanisme untuk membolehkan pemindahan tanah tersebut. Tiada isu sebarang salah laku oleh defendan dalam memindahkan tanah 10427. Grand Ocean sebenarnya telah menolong persatuan tersebut dalam memberikan bantuan kewangan di mana tanpanya transaksi penukaran tersebut tidak dapat H dilakukan (lihat perenggan 29–30).

(4) Berhubungan dengan isu ketiga, mahkamah telah mendapati bahawa plaintif telah gagal melaksanakan beban pembuktiannya. Daripada fakta-fakta kes tersebut, ia adalah jelas defendan telah pada dua kali berlainan mengemukakan urusan-urusan dengan Tan Sri kepada I persatuan tersebut semasa Mesyuarat Am Tahunan pada 1985 dan 1990. Dengan itu, tiada penipuan atau perlanggaran kewajipan fidusiari dilakukan oleh defendan. Plaintif juga telah gagal membuktikan tanah 1519 tersebut diberikan kepada persatuan tersebut secara percuma (lihat perenggan 31–32).]

Notes

For cases on transfer, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2375–2379.

For cases on want of authority, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4736–4740.

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 (refd)

Edwards v Halliwell [1950] 1 All ER 1064 (folld)

Foss v Harbottle [1843] 2 Hare 461 (folld)

Macdouaall v Gardiner [1875] 1 Ch D 13 (refd)

Legislation referred to

Societies Regulations 1966 r 13

CW Chan (Syarikat Chan Chow Wang) for the plaintiffs.

Gan Khong Aik (Tee Tai Tzian & Sim) together with Amir Nordin (Khairuddin, Ngiam & Tan) for the defendants.

Azmel J (now FCJ):

[1] In this case the plaintiffs' claim against the defendants are for breach of trust, breach of fiduciary duty and fraud.

[2] The brief facts are as follows. The plaintiffs are members of 'Persatuan Kheng Chew' ('society'). At the material time the first and second defendants were trustees for the society. The third and fourth defendants were the Vice President of the Society. The fifth defendant was the treasurer of the society whilst the sixth defendant was the assistant treasurer. The seventh defendant was the Secretary of the society, the eighth defendant was the assistant education officer whilst the ninth defendant was the Social Relation's Officer of the society. The tenth to the fourteenth defendants were the members of the Executive Committee of the society.

[3] The society intended to build a temple. In order to achieve this purpose, the society applied and was alienated with a piece of land known as HS(D) 10427 Lot 3 Mukim dan Bandar Kuala Lumpur (the 10427 land) comprising an area of 33,079 sq ft. However, during the commencement of the construction of the temple, the society faced certain difficulties, namely:

(a) it was difficult to carry out works because of the gradient of the 10427 land;

A (b) access to the site was only from the main road where the traffic was heavy;

(c) the piling for the foundation caused some earth movements and there were concerns for the safety of the neighbouring houses; and

B (d) Tan Sri Lim Goh Tong ('Tan Sri'), the owner of a neighbouring land requested the society to reconsider the building of the temple on the 10427 land as it would affect the security of his house.

[4] Tan Sri's land is situated at Lot 50 section 94A. He offered to exchange
C 2.08 acres of land known as Mukim Grant no 67 Lot 42 Mukim Kuala Lumpur (Lot 42) with the 10427 land. The total area of Lot 42 was 4.8 acres. It was registered in the name of Kien Huat Realty Sdn Bhd ('Kien Huat') of which Tan Sri is a shareholder and director.

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[5] Tan Sri wanted the exchange to be done in a certain manner. Lot 42 was to be subdivided so that a separate title would be issued for the part of the land to be used for the temple. On 1 July 1979, the Executive Committee of the society (the members of the Executive Committee at the material time) had authorized the second defendant and Tan Koon Swan ('DW1') to discuss
E the matter with Tan Sri.

[6] The society, through the second defendant and Tan Koon Swan, agreed to exchange the land based on the following reasons:

F (a) the members of the society were impatient to have the temple;

(b) the area of Lot 42 to be given by Tan Sri upon which the temple was to be built was greater than the 10427 land;

(c) Lot 42 is a freehold land whereas 10427 land is leasehold; and

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(d) Lot 42 is away from the main road, with easy access and much easier to construct the temple.

[7] The agreement for the exchange of land was documented by a deed of
H gift dated 6 December 1979 executed by Kien Huat and the society. The land had to be converted and sub-divided. Accordingly Kien Huat applied for conversion of land use and sub-division of Lot 42. The application was approved and RM503,138 was to be paid as additional premium for the sub-division and conversion of land use of Lot 42. A drainage fee of
I RM24,600 was also to be paid to the authorities.

[8] The society was to have only 2.8 acres of Lot 42. In addition the society had to bear the cost of conversion and the drainage fee. Kien Huat suggested to the society that if they wanted the remaining part of Lot 42 they would

have to pay an additional amount of RM400,000 in the form of a donation to Yayasan Lim (a charitable foundation set up by Tan Sri) thus making a total payment of RM927,198 for the society to get the whole of Lot 42.

[9] But the society could not, at that relevant time, raise that amount of money. The money that the society had then was only sufficient for the cost of constructing the temple. In order to effect the purchase, the society requested the assistance of Grand Ocean Development Berhad (a public listed company where most of its shareholders were also members of the society) and the defendants were the directors. Two further agreements namely the supplementary deed dated 8 June 1981 between Kien Huat and the society; and a joint venture agreement dated 26 June 1981 between the society and Grand Ocean were signed to effect the transaction.

[10] Subsequently, Lot 42 was subdivided into two separate titles:

(a) GM 1518 Lot 97 section 94B Mukim Kuala Lumpur (1518 land);

(b) GM 1519 Lot 98 section 94B Mukim Kuala Lumpur (1519 land).

[11] The 1518 land was registered in the name of Tan Koon Swan, Loong Lit Hong, the first and second defendants. The use of the land is for building the temple.

[12] The 1519 land was initially registered in the name of Tan Koon Swan, Loong Lit Hong, the first and second defendants and was later transferred to Grand Ocean (where the use of land is for construction of condominium) pursuant to the aforesaid agreements.

[13] On 22 December 1985, the members of the society had resolved in an Annual General Meeting that the 10427 land be transferred to Tan Sri in accordance with the agreement made between him and the Executive Committee of the society in accordance with cl 5 of the deed of gift dated 6 December 1979, which reads:

> (5.) The donee shall immediately upon the approval of the conversion of the red area execute or cause to be executed a valid and registrable document of surrender of the site of the temple to the relevant authority.

The society had also written to the Jawatankuasa Eksekutif Tanah Wilayah Kuala Lumpur requesting them to effect the transfer of the land to Kien Huat.

[14] Subsequently in the Annual General Meeting of the society for 1990,

A the issue of transfer of land between the society and Tan Sri was discussed. In that meeting, after intense debate, it was resolved as follows:

> The meeting was satisfied with the explanation given on the Tian Hou Kong Temple land issue and was of the view that it was not necessary to pursue the
B matter in an Extraordinary General Meeting.

[15] The first plaintiff lodged a police report against the trustee of the society regarding the exchange of land by way of a letter dated 26 June 1991. The transfer according to the plaintiffs was not valid because r 13 of the
C Societies Regulations 1966 states:

> The properties of the Association shall not be sold to meet the expenditure of the Association. Properties shall only be sold if a resolution has been passed by three quarter majority of the members present at a General Meeting.
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The plaintiffs alleged that this Rule was not abided by the defendants.

[16] On 17 January 1992 the 10247 land was transferred to Kien Huat. The Society then completed the construction of the temple on the 1518 land.
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[17] It was on the basis of such backdrop that the plaintiffs filed this action against the defendants. The crux of the plaintiffs' case against the defendants is that they had unlawfully transferred out the land of the society without the consent of the society and/or majority of its members and that in doing so,
F they had committed breach of trust, breach of fiduciary duties (failure to exercise due care, skill and diligence for the benefit of the members of the society) and defrauded the society. Therefore the plaintiff's claimed for damages for loss and the invalid transfer of the 1519 land.

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[18] The disputes between the plaintiffs and the defendants centred mainly on three issues, namely:

(a) whether the plaintiffs have the *locus standi* to commence this action against the defendants for the benefit and interest of themselves and the
H other members of the society except the defendants;

(b) whether the 1519 land is the property of the society; and

(c) whether the plaintiffs have proven their case against the defendants in law.
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[19] At the hearing three witnesses were called for the plaintiffs, namely:

(a) Ismail bin Mokhtar, the Head Assistant Director of the Development Unit at the Land Office ('PW1');

(b) Tuan Deh Toon ('PW2'); and

(c) Teo Eng Siong, the Secretary of Kien Huat Realty Sdn. Bhd ('PW3').

[20] The defendants on the other hand called six witnesses, namely:

(a) Tan Koon Swan, former trustee of the society ('DW1');

(b) Lee Yong Chee @ Lee Ah Fong, a Commissioner for Oaths ('DW2');

(c) Tan Loon Swan ('DW3');

(d) Loong Suet Yeng who was in charge of book-keeping for Wing Construction (M) Sdn Bhd ('DW4');

(e) DSP Chew Tham Soon, Head of the Management Division of IPD Kota Kinabalu, Sabah ('DW5'); and

(f) Foo Seong Foo ('DW6').

[21] As regards to the first issue, based on the circumstances of this case, it is my finding that the plaintiffs do not have the locus standi to commence this action against the defendants for the benefit and interest of themselves and other members of the society. As members of a society, the rights of the plaintiffs to sue is governed by the rule in *Foss v Harbottle* [1843] 2 Hare 461 which was followed by the Court of Appeal in *Edwards v Halliwell* [1950] 1 All ER 1064. The Court of Appeal stated:

> The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quoestio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual members can assert in his own right.

Similar principle was applied by the English Court of *Macdouaall v Gardiner* [1875] 1 Ch D 13 as follows:

A … it is of the utmost importance in all these companies that the rule which is well known in this court as the rule in *Foss v Harbottle* should always be adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent - unless there is
B something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it … and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject matter of litigation, or whether it will take steps itself to prevent the wrong from being done.

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[22] In applying the above principles, it is clear from the facts of the case that the wrongdoing was alleged to have been committed against the society or against the majority of its members. Following the rule in *Foss v Harbottle*,
D the action in this case must be made/commenced in the name of the society. That had not been done. Neither was it commenced in the name of the majority of the members of the society. There was no evidence that the plaintiffs had the consent of the majority of the members of the society to commence this action on their behalf. This fact had been admitted by the
E fourth plaintiff when he stated in evidence that he did not have any consent from the society to commence the action. Therefore, following the rule in *Foss v Harbottle*, it is clear that it was for the society to decide whether any action is to be taken or not against the defendants and not for the plaintiffs to decide.

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[23] The fact that there were two occasions (in paras 13 and 14 above) where the society authorized and approved the exchange of the society land with that of Tan Sri's, only shows that there was nothing wrong with the transfer of land that had occurred. The transfer was valid and the alleged
G wrongdoing was without basis.

[24] For the reasons as mentioned above, it is my finding that the plaintiffs have no *locus standi* to bring this action against the defendants. As regard the second issue, I must first of all carefully evaluate the facts of the case. The
H 1519 land is part of Lot 42 originally owned by Kien Huat. Based on the exchange between Tan Sri and the society it had since been subdivided. The other part of Lot 42 which is the 1518 land was used to build the Thean Hou Temple as the exchange of the 10427 land.

I **[25]** Based on the evidence before me the 1519 land had never become the property of the society. All the time it was the property of Kien Huat. What had actually transpired at the exchange was that the 10427 land was to be exchanged with the 1518 land, which is part of Lot 42. But the society had to pay the conversion costs and drainage fee which the society was unable to

raise. Hence to enable the exchange transaction to proceed the solution was reached that a third party, Grand Ocean Development Bhd would come in to assist by absorbing the conversion cost and drainage fee and purchase the remaining portion of Lot 42 by making the donation to Yayasan Lim in the sum of RM400,000. Only after such involvement of the third party could the exchange of land take place. Without the assistance of Grand Ocean Development Bhd the 1519 land could never have been transferred to and owned by the society.

[26] The mechanics of the exchange were as follows. The Executive Committee of the Society had authorized the second defendant and Tan Koon Swan to deal/discuss with Tan Sri on the issue of exchange of land. It was agreed that Tan Sri would exchange 2.08 acres of Lot 42, owned by Kien Huat with the 10427 land. To materialize the exchange, parties had executed a deed of gift dated 6 December 1979 as an agreement to exchange the land. The intention of the parties was clearly set out in two documents namely:

(a) the letter from the society to the Jawatankuasa Eksekutif Tanah Wilayah Kuala Lumpur (bundle D p 29) which states at para 5:

> Kini kami bertanggungjawab dan berobligasi untuk menukarmilik tanah berkenaan kepada Tan Sri Lim, dengan menurut fasal (5) di bawah Surat Perjanjian Pemberian yang telah disempurnakan oleh kedua-dua pihak pada 6 Disember 1979 itu; and

(b) the letter from Tan Sri to the Society dated 28 June 1985 (bundle E p 5) which states at para 3:

> As I have done my part in providing you with an acceptable alternative piece of land which will benefit yourAssociation as your original temple site was too near the main road and too close to heavy traffic, I now request you to transfer your original temple land back to us as agreed. My personal assistant has spoken to Mr Tan Koon Swan's office as he has indicated that this would be done.

[27] The need to have the supplementary deed was because of the need to pay the premium levied by the authority which Kien Huat did not want to bear. Kien Huat had also offered the society to acquire the remaining part of Lot 42. Since the society did not have the required financial means, Grand Ocean Development Bhd (a company in which most of the shareholders and directors were members of the society) agreed to acquire the remaining part of Lot 42, an act to ensure that the exchange of land could take place.

[28] In order to minimize payment of tax for the transaction, it was agreed

by both parties that a supplementary deed and a joint venture agreement (as mentioned above in para 9) be signed by the parties thereto. Clause 8 of the joint venture agreement states:

> The owner (the society) shall execute a registrable memorandum of transfer of all the document of titles pertaining to the developers (Grand Ocean) lots in favour of the developers and/or their nominees free of encumbrances, charges and liens and with vacant possession as soon as the building plans have been approved by the appropriate authority, and the said memorandum of transfer shall be deposited with the said solicitor of safe keeping.

This clearly shows that Grand Ocean was to acquire the ownership and benefit derived from the remaining part of Lot 42. The donation of RM400,000 to Yayasan Lim as required was handed to Kien Huat on the same day when the supplementary deed was signed. In the light of the arrangement as mentioned above there was no evidence whatsoever that the society had made any such payment to legitimize its claim over the remaining portion of Lot 42 (the 1519 land). In so far as the society was concerned the exchange between the 10427 land and the 1518 land was free of any payments whatsoever.

[29] Prior to subdivision, Kien Huat could not transfer the two parts of Lot 42 to 2 different parties. Lot 42 was originally transferred to the society on the basis of the above understanding and upon it being subdivided, the society transferred the other part of Lot 42 (the 1519 land) to Grand Ocean Development Bhd who had borne all the payments thereof. This is why the 1519 land was initially registered in the name of the trustees of the society, only as a mechanism to effect the transfer of the land.

[30] Therefore, from the facts of the case, having regard to the size and value of the lands involved, it can be concluded that Tan Sri only intended to exchange part of Lot 42 with the society for the 10427 land and intended that monetary payment be made by the society in order to acquire the remaining part of Lot 42. It was Grand Ocean who assisted by coming up with all the monetary requirement and not the society. Thus the 1519 land could not have been given by Tan Sri to the society as part of the exchange. Based on the above, I arrived at the conclusion that the 1519 land was not the property of the society. There is no issue of any alleged wrongdoing by the defendants in transferring the 10427 land. Grand Ocean was in fact doing the society a big favour in coming up with the financial assistance without which the exchange transaction could not have taken place.

[31] As regard to the third issue, it is my finding that the plaintiffs had failed to discharge its burden of proof. In the case of *Ang Hiok Seng @ Ang*

Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 the Federal Court ruled at p 60:

> where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion or speculation merely.

[32] From the facts of the case, it is clear that the defendants had on two different occasions disclosed the dealings with Tan Sri to the society during its Annual General Meetings in 1985 and 1990 as stated above. Therefore, no fraud or breach of fiduciary duties had ever been committed by the defendants. The plaintiffs also failed to proved that the 1519 land was given to the society free of charge. Also, based on the police report lodged, it was decided that no further action was to be taken. I therefore ruled that the plaintiffs have not discharged its burden of proof. Even if the burden is on a balance of probabilities the plaintiffs had also failed to prove it.

[33] In the circumstances and for the reasons that I have stated above, I dismissed the plaintiff's claim with costs.

Plaintiff's claims dismissed with costs.

Reported by Sally Kee